

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

AMENDED SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO SUMMARY ORDERS FILED AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY THIS COURT'S LOCAL RULE 32.1 AND FEDERAL RULE OF APPELLATE PROCEDURE 32.1. IN A BRIEF OR OTHER PAPER IN WHICH A LITIGANT CITES A SUMMARY ORDER, IN EACH PARAGRAPH IN WHICH A CITATION APPEARS, AT LEAST ONE CITATION MUST EITHER BE TO THE FEDERAL APPENDIX OR BE ACCOMPANIED BY THE NOTATION: (SUMMARY ORDER). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF THAT SUMMARY ORDER TOGETHER WITH THE PAPER IN WHICH THE SUMMARY ORDER IS CITED ON ANY PARTY NOT REPRESENTED BY COUNSEL UNLESS THE SUMMARY ORDER IS AVAILABLE IN AN ELECTRONIC DATABASE WHICH IS PUBLICLY ACCESSIBLE WITHOUT PAYMENT OF FEE (SUCH AS THE DATABASE AVAILABLE AT [HTTP://WWW.CA2.USCOURTS.GOV](http://www.ca2.uscourts.gov)). IF NO COPY IS SERVED BY REASON OF THE AVAILABILITY OF THE ORDER ON SUCH A DATABASE, THE CITATION MUST INCLUDE REFERENCE TO THAT DATABASE AND THE DOCKET NUMBER OF THE CASE IN WHICH THE ORDER WAS ENTERED.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 7th day of October, two thousand nine,

PRESENT:

BARRINGTON D. PARKER,
JON O. NEWMAN,
DEBRA ANN LIVINGSTON,
Circuit Judges.

PAUL WESOLOWSKI, LAURA WESOLOWSKI,

Plaintiffs-Appellants,

-v.-

J. RICHARD BOCKELMANN, Ulster County Sheriff,
BRADFORD EBEL, Superintendent, RAY ACEVEDO,
Warden, County of Ulster,

Defendants-Appellees.

**No. 07-4175-cv
SUMMARY ORDER**

1 FOR PLAINTIFFS-APPELLANTS: Michael H. Sussman, Sussman & Watkins, Goshen,
2 NY

3
4 FOR DEFENDANTS-APPELLEES: Michael T. Snyder, Maynard, O'Connor, Smith &
5 Catalinotto, LLP, Albany, NY
6

7 Appeal from a decision of the United States District Court for the Northern District of
8 New York (Kahn, *J.*)

9 **UPON DUE CONSIDERATION, it is hereby ORDERED, ADJUDGED, AND**
10 **DECREED that this appeal of the judgment of the district court is AFFIRMED.**

11 Corporal Paul Wesolowski and Laura Wesolowski ("Plaintiffs-Appellants") appeal from a
12 judgment of the United States District Court for the Northern District of New York (Kahn, *J.*)
13 granting the summary judgment motion of J. Richard Bockelmann, Ulster County Sheriff,
14 Bradford Ebel, Ulster County Corrections Superintendent, and Ray Acevedo, Ulster County
15 Corrections Warden ("Defendants-Appellees") and dismissing Plaintiffs-Appellants' claims
16 alleging retaliatory conduct in violation of their First Amendment rights. *See* 42 U.S.C. § 1983.
17 The district court concluded that Corporal Wesolowski's report of prisoner abuse was not
18 protected by the First Amendment because he made it pursuant to his official duties and that
19 Laura Wesolowski had presented insufficient evidence to support her claim of retaliation on the
20 basis of her intimate association with him. We assume the parties' familiarity with the underlying
21 facts, procedural history, and issues presented on appeal.

22 We review a district court's grant of summary judgment *de novo*. *Dillon v. Morano*, 497
23 F.3d 247, 251 (2d Cir. 2007). We affirm only if, after "resolv[ing] all ambiguities and draw[ing]
24 all permissible inferences in favor of the non-moving party," the moving party has shown there
25 are no triable issues of material fact. *Jaegly v. Couch*, 439 F.3d 149, 151 (2d Cir. 2006).

1 The district court correctly determined that Corporal Wesolowski's act of taking his
2 written report of the alleged prisoner abuse to his lieutenant was not speech protected by the First
3 Amendment. Under *Garcetti v. Ceballos*, 547 U.S. 410 (2006), "the First Amendment does not
4 prohibit managerial discipline based on an employee's expressions made pursuant to official
5 responsibilities." *Id.* at 424. Consequently, even if, *arguendo*, Defendants-Appellees acted
6 against Plaintiffs-Appellants because of Corporal Wesolowski's reporting, if his reporting were
7 part of his official job responsibilities, Plaintiffs-Appellants would have no claim for injury under
8 the First Amendment. Since determining the scope of such responsibilities is a "practical" rather
9 than formalistic exercise, *id.*, we look beyond an employee's job description for this purpose and
10 instead examine "the duties an employee actually is expected to perform" in the course of his
11 employment, *id.* at 424-25.

12 Plaintiffs-Appellants contend that Corporal Wesolowski's action was not pursuant to his
13 official responsibilities because he made the report outside the chain-of-command of the Ulster
14 County Sheriff's Department ("Department"). Specifically, they argue that he was required to
15 report the complaint only to the sergeants who were his direct superiors, so when he brought the
16 report to Lieutenant Scott after the sergeants failed to sign it and allegedly reluctantly directed him
17 to take it to a lieutenant, he was acting as a private citizen, not an employee of the Department.
18 As further evidence that the report was not job-related, they cite Lieutenant Scott's alleged
19 questioning of why Corporal Wesolowski had put the prisoner's complaint in writing at all, prior
20 to the lieutenant's receipt of the report and his briefing of Warden Acevedo about the alleged
21 assault.

22 Although in *Garcetti* the Supreme Court did not articulate "a comprehensive framework

1 for defining the scope of an employee's duties in cases where there is room for serious debate," *id.*
2 at 424, we are not faced with such a close question here because none of the allegations regarding
3 the Department officials' behavior demonstrates that Corporal Wesolowski's reporting was not
4 job-related. Rather, since he was following the orders of his direct superiors in bringing the report
5 to Lieutenant Scott's attention and the lieutenant himself pursued the complaint, his actions were
6 consistent with the duties these superiors expected him to perform, even if various statements they
7 made at the time showed they were displeased by the report itself. As a result, the acts of
8 retaliation Plaintiffs-Appellants contend that the Defendants-Appellees took against them because
9 of the reporting are not actionable on the basis that it was constitutionally protected speech.

10 The district court also correctly concluded that Plaintiffs-Appellants failed to adduce
11 sufficient evidence to support their contention that Defendants-Appellees retaliated against Laura
12 Wesolowski on the basis of her intimate association with Corporal Wesolowski by failing twice to
13 hire her for a stock clerk position at the Department. "In order to survive a motion for summary
14 judgment on a First Amendment retaliation claim, a plaintiff must bring forth evidence showing
15 that [among other things] . . . there was a causal connection between the protected activity and the
16 adverse employment action." *Dillon*, 497 F.3d at 251. Even interpreted in a light most favorable
17 to the Plaintiffs-Appellants, Laura Wesolowski's alleged relevant prior experience, favorable job
18 interview for the position, and a civil service score superior to that of another successful candidate
19 do not show that the Department failed to select her because she was married to Corporal
20 Wesolowski. As a result, this claim is also without merit.

21 For these reasons, the district court's judgment is AFFIRMED.

22
23 For the Court:
24 Catherine O'Hagan Wolfe, Clerk
25

26 By: _____